INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	4
Argument	8
Conclusion	25

CITATIONS

Cases:

Agnello v. *United States*, 269 U. S. 20 — 14
Berger v. *United States*, 295 U. S. 78 — 20
Bersio v. *United States*, 124 F. 2d 310, certiorari denied, 316 U. S. 665 — 16
Bowles v. *Beatrice Creamery Co.*, 146 F. 2d 774 — 13
Bowles v. *Glick Bros. Lumber Co.*, 146 F. 2d 566 — 13
Bowles v. *Stitzinger*, 59 F. Supp. 94 — 13
Bridgeman v. *United States*, 140 Fed. 577 — 16
Clarke v. *United States*, 132 F. 2d 538, certiorari denied, 318 U. S. 789 — 23
Dealy v. *United States*, 152 U. S. 539 — 22
Dunlop v. *United States*, 165 U. S. 486 — 16
Fleming v. *Montgomery Ward & Co.*, 114 F. 2d 384, certiorari denied, 311 U. S. 690 — 13
Ford v. *United States*, 273 U. S. 593 — 22
14 East 17th Street, In re, 65 F. 2d 289 — 14
Glasser v. *United States*, 315 U. S. 60 — 16
Guckenheimer A., & Bros. Co. v. *United States*, 3 F. 2d 786, certiorari denied, 268 U. S. 688 — 14
Hagner v. *United States*, 285 U. S. 427 — 16
Johnson v. *United States*, 318 U. S. 189 — 19
Marron v. *United States*, 275 U. S. 192 — 14
Roberts v. *United States*, 137 F. 2d 412, certiorari denied, 320 U. S. 768 — 16
Rodgers v. *United States*, 138 F. 2d 992 — 13
Salinger v. *United States*, 272 U. S. 542 — 22
Steiner v. *United States*, 134 F. 2d 931, certiorari denied, 319 U. S. 774 — 19
Summers v. *United States*, 11 F. 2d 583, certiorari denied, 271 U. S. 681 — 16
Takahashi v. *United States*, 143 F. 2d 118 — 14
United States v. *Ballard*, 35 F. Supp. 105 — 17

Cases—Continued

	Page
United States v. *Goldsmith*, 108 F. 2d 917, certiorari denied, 309 U. S. 678	16
United States v. *J. Greenbaum & Sons*, 123 F. 2d 770	23
United States v. *Pelley*, 132 F. 2d 170, certiorari denied, 318 U. S. 764	17
United States v. *Rabicoff*, 55 F. Supp. 88	14
United States v. *Sherry*, 294 Fed. 684	14
Wilson v. *United States*, 221 U. S. 361	13
Wong Tai v. *United States*, 273 U. S. 77	16
Wuichet v. *United States*, 8 F. 2d 561	17
Constitution and Statutes:	
Constitution:	
Fourth Amendment	15
Fifth Amendment	15
Criminal Code (18 U. S. C. 80):	
Section 35 (A)	3, 16, 23
Judicial Code (28 U. S. C. 391):	
Section 269	20, 23
10 U. S. C. 310 (l)	12
Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643)	12, 13
Miscellaneous:	
Executive Order 9127	13

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 805–807) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 4, 1945 (R. 808), and a petition for rehearing was denied on September 13, 1945 (R. 809). The petition for a writ of certiorari was filed on October 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and

XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether books and records relating to petitioner's contract with the Navy Department were inadmissible as evidence at his trial.

2. Whether the indictment is sufficiently definite and certain.

3. Whether petitioner's plea in abatement based on the absence of women from the grand jury was properly overruled.

4. Whether petitioner was deprived of an opportunity to prepare his defense because certain records were removed to a vault for protection by the Navy Department.

5. Whether the fact that petitioner did not hear a discussion among counsel at the bench which resulted in the dismissal of a juror by consent constituted a deprivation of his right to be present at all stages of the trial.

6. Whether the evidence was sufficient to support the verdict.

7. Whether the trial judge properly instructed the jury on the nature of the offense and the requisite intent.

8. Whether the circuit court of appeals abused its discretion in denying petitioner's motion for a remand of the case to the district court in order to enable him to move for a new trial.

STATUTE INVOLVED

Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was convicted on Counts 1, 4, and 5 of an indictment returned against him and Lieutenant Commander Lloyd Scott in the United States District Court for the Southern District of California (R. 2–25, 60–61, 62, 730–731).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the Government consented to a reversal of the conviction on the first count on the ground that the indictment was not sufficiently definite and certain to apprise petitioner of the crime charged (R. 805). The circuit court of appeals affirmed the judgment on Counts 4 and 5, by which petitioner was sentenced to imprisonment for nine months on each count, the sentences to run concurrently, and to pay a fine of $2,000 on each count (R. 67–69, 808).

Count 4 charged that, on or about October 16, 1942, the defendants unlawfully presented to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, a claim for payment which was known to be false in that the claim was for $4,000 allegedly paid to William H. McAvoy for services as a test pilot, whereas McAvoy had in fact been paid only $2,375 (R. 8–9). Count 5 charged that defendants unlawfully concealed a material fact and made a false representation in a matter within the juris-

[1] The court directed a verdict of acquittal as to Scott (R. 61).

diction of the United States Navy by representing to Hilton Byars, the Navy cost inspector, that $4,000 had been paid to McAvoy and presenting to Byars a cancelled check to McAvoy's order for that sum, whereas, at defendants' request, the check had been endorsed by McAvoy in blank and defendants had filled in the figure of $4,000 and received the proceeds of such check, paying McAvoy only $2,375 (R. 9–11).

The evidence for the Government on these counts may be summarized as follows:

Petitioner entered into a contract with the Navy Department (No. 83142) under which he was to do experimental work on airplane wings, being paid in part on a cost plus fixed fee basis (Gov. Ex. 3, R. 282–284). In January 1942, in a letter to the resident inspector of naval aircraft, petitioner called attention to the fact that no provision had been made for preliminary flight demonstrations, and submitted an estimate of the cost of such test flights (R. 284–287; Gov. Ex. 49, R. 482–484). In June 1942, the Navy Department approved a modification of the contract to provide for test flights, payment to be made at cost plus a fixed fee (R. 288–289). In his estimate of the probable cost of the test flights, petitioner listed the cost of a test pilot's fee and insurance at $4,000 (R. 483). At that time, he had already agreed to pay test pilot McAvoy between $2,000 and $2,500 for making the tests (R. 639).

McAvoy did make test flights at Hughes Field and, from September 25 to October 5, at Daggett Field, California (R. 306–308). McAvoy originally testified that petitioner paid him $2,075 by check and $300 in cash (R. 302–304). On cross-examination he was shown another check to his order, dated October 4, 1942, in the sum of $200, and acknowledged the endorsement on the check as his (R. 309–310). Petitioner testified that $50 in petty cash had also been paid to McAvoy (R. 607). On October 6, 1942, McAvoy signed a receipt for the $300 received in cash as payment for excess time in flight testing (Gov. Ex. 5, R. 302–303), and on October 11, 1942, he signed a statement acknowledging "final payment in full" for his test flight services without specifying the amount received (Gov. Ex. 6, R. 303–304).

A day or two before they went to Daggett Field for the test flights, petitioner asked McAvoy to endorse a blank check, telling him that the check was to be used to cover the general expenses of the trip. McAvoy endorsed the check and returned it to petitioner. (R. 300–302.) Petitioner's bookkeeper, Ethel Boyle, had given the check to Thomas C. Browne, petitioner's auditor, on September 23; it was blank except for the date typed on the check (R. 466). On October 13, petitioner gave it back to Miss Boyle still blank, except for the date, McAvoy's endorse-

ment, and petitioner's signature, and told her to fill it in (R. 466). Browne instructed her to fill in McAvoy's name as payee and $4,000 as the amount (R. 466–468, 554–555). The check was then deposited in petitioner's account (R. 466, 555). It was posted in petitioner's books of account as a payment to McAvoy (R. 429–430, 453).

In October 1942, petitioner presented to the Navy Department a voucher for "work on a cost plus fixed a fee basis under contract No. 83142," which listed "Other Direct Charges—$4,300" (Gov. Ex. 19, R. 362–363).[2] Supporting the claim was a document bearing petitioner's signature in which he certified that he had paid $4,000 to McAvoy by "check, 4679, dated 9-23-42" (R. 363), that being the number and date of the check endorsed by McAvoy in blank (R. 301; Gov. Ex. 7, R. 316). Another voucher for per diem expenses in connection with the test flights at Daggett Field was supported by a certificate signed by petitioner in which per diem expenses for McAvoy were separately listed (Gov. Ex. 19, R. 363–364). Hilton Byars, the Navy cost inspector who audited petitioner's books (R. 503),

[2] The Navy cost inspector, Hilton Byars, testified that as petitioner accumulated costs he would notify the inspector. After a preliminary audit had been conducted, the voucher would be prepared by the Navy, forwarded to petitioner for signature, then signed by the cost inspector and forwarded to the disursing officer. (R. 291.)

testified that, in connection with his audit of the claims on Contract No. 83142, he received the certification by petitioner of the $4,000 payment to McAvoy, and the receipts signed by McAvoy acknowledging payment of $300 in cash and "final payment" for his services (R. 516–517). Petitioner's claim for $4,300 for McAvoy's services and his claim for per diem expenses were paid by the Navy Department (R. 514).

ARGUMENT

1. Petitioner contends (Pet. 19, 24, 25, Br. 3–4, 7–31) that Government's Exhibit 7, the $4,000 check endorsed in blank by McAvoy (R. 316), and Government's Exhibits 34 to 45, petitioner's business records (R. 421–424, 426), were obtained as a result of an illegal search and seizure, and hence that the district court erred in denying petitioner's motion to suppress the evidence and in allowing the documents to be introduced at the trial. The facts on this issue, as developed in the affidavits submitted on petitioner's motion to suppress, are as follows:

On October 31, 1942, Harry Champlin, employed by petitioner as comptroller, made an affidavit in which he stated that he had seen checks indicating regular payments by petitioner to his co-defendant Lieutenant Commander Lloyd Scott, the resident inspector of naval aircraft (R. 187–189). On the basis of this affidavit and one by Murray Myerson, an F. B. I. agent (R. 183–184),

a search warrant was issued on October 31, 1942, authorizing the search of apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California, petitioner's living quarters (R. 184–186). Pursuant to this search warrant, one book of check stubs and six checks were seized (R. 186). When petitioner made his motion to suppress, it was discovered that his address, which was the place searched, was 10974½ Wilshire Boulevard (R. 196–197), and the Government consented to the entry of an order suppressing the evidence on the ground that the description of the premises was insufficient (R. 190, 203–204).

On the basis of Champlin's and Myerson's affidavits, another warrant was obtained on October 31, 1942, for a search of petitioner's offices at 1005 Broxton Avenue (R. 179–182). Two books of check stubs were seized (R. 183), but were not used at the trial.

From October 20 to December 1, 1942, two F. B. I. agents, Myerson and Sloane, acting under the auspices and by the authority of a senior accountant and a cost inspector of the Navy, conducted an audit of petitioner's books and records at his place of business during business hours (R. 192–195). The affidavit of Miss Boyle, petitioner's bookkeeper, submitted by petitioner on his motion to suppress, indicates that she cooperated with the agents by supplying records and furnishing requested information (R. 154–

155). During the course of that investigation, Myerson discovered the $4,000 check to test pilot McAvoy (Gov. Ex. 7) and asked the bookkeeper for the check, which Myerson then kept in his possession (R. 155). On December 1, 1942, Myerson applied for a search warrant of the business premises, stating in his affidavit that he had been on the premises by reason of a previous search warrant and had observed certain books and records, which he identified (R. 177–179). On the basis of this affidavit, a search warrant was issued on the same day and checks and records were seized (R. 174–177). Government's Exhibit 7, the $4,000 check, is not specifically mentioned in the return, but the request for the warrant, and the warrant itself, referred to all cancelled checks of the company and of petitioner personally (R. 175, 178). The return covered the March to November 1942 cancelled checks (R. 177), which would include Government's Exhibit 7 (R. 317).

In his motion to suppress, petitioner alleged that, prior to the issuance of the first warrants on October 31, while he and his wife were out of town, his apartment had been searched (R. 129–130, 136–137); that the search warrants of October 31 were based on insufficient affidavits (R. 130–131); that the examination of his records during the month of November was illegal (R. 131–132, 137–138, 147–150), and that the latest search warrant of December 1 was issued

on the basis of an insufficent affidavit (R. 131–132). At the argument on the motion, he made a request for leave to take oral testimony of Myerson, which was denied (R. 237–238). After the close of the argument, petitioner filed a written offer of proof in which he stated that Myerson, if called as a witness, would have testified that on October 20, before the issuance of the first warrant, he had searched petitioner's apartment, and that the examination of the books and records at petitioner's premises during the month of November 1942, was not made pursuant to a search warrant (R. 163–167). The district judge denied the motion to suppress, except as to the checks taken from petitioner's apartment (R. 203–204). At the trial, petitioner objected to the introduction of evidence seized pursuant to the search warrant of December 1, and again sought to take the testimony of Myerson (R. 369, 380). He did not object to the introduction of Government's Exhibit 7 (R. 316), but subsequently moved to have the exhibit stricken on the ground that it was illegally obtained (R. 379–380).

Since the evidence obtained under the search warrants of October 31 was not used at the trial, questions raised by petitioner as to their validity (Br. 15) are immaterial.[3] As to the records intro-

[3] For this reason it is unnecessary to consider petitioner's contention (Pet. 19, 25–26, Br. 19–22) that the district court erred in denying his request to take the oral testimony of Myerson on the motion to suppress. The "offer of proof"

duced against petitioner, the significant facts are that F. B. I. agents, acting under the authority of the Navy, conducted an audit of petitioner's books; that in the course of that examination they kept possession of Exhibit 7 (the $4,000 check to test pilot McAvoy); and, at the close of their investigation, obtained a search warrant for petitioner's books and records on the basis of an affidavit, which we concede to be technically deficient in that it failed to set forth grounds for believing that petitioner had committed an offense.

We think there can be no question of the propriety of the audit of petitioner's books and records. The right of inspection is specifically accorded by statute (10 U. S. C. 310 (*l*) and 50 U. S. C. App., Supp. IV, 643), and by the terms of petitioner's contract with the Navy Department (Gov. Ex. 3), which provided:

> The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.

Petitioner's records were thus quasi-public documents, and their inspection and the use of the evi-

---

filed by petitioner shows that he wished to question Myerson as to an alleged search of petitioner's apartment on October 20 for the evidence which was suppressed (R. 164–165), and that he wished to show that Myerson took the $4,000 check during his examination of petitioner's books (R. 166), a fact which is not denied.

dence obtained thereby violated none of petitioner's constitutional rights. *Wilson* v. *United States*, 221 U. S. 361, 380; *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9); *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, 779 (C. C. A. 10); *Rodgers* v. *United States*, 138 F. 2d 992, 995–996 (C. C. A. 6); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384, 388–392 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Bowles* v. *Stitzinger*, 59 F. Supp. 94 (W. D. Pa.).[4]

Petitioner argues (Pet. 19, 21, 24, Br. 30–31) that F. B. I. agents were not authorized to conduct the audit under Executive Order 9127 (see Appendix to the Petition, pp. 7–9), whereby the President designated certain agencies to exercise the power of inspection conferred by Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643). However, the F. B. I. agents were acting under the auspices and by the authority of the Navy Department, one of the departments designated in the Executive Order, and, we submit, petitioner cannot question the authority of the Navy to use such personnel as it chose. Moreover, by his contract, petitioner agreed to keep his records "open at all times to the Government and its representatives" (Gov. Ex. 3, R. 282–284).

---

[4] If inspection had been resisted, the Government would have been required to resort to court order in order to obtain the documents, but the affidavit of petitioner's bookkeeper establishes that she cooperated with the agents (see *supra*, p. 2).

Since the examination of petitioner's records was proper, the technical invalidity of the affidavit by which the search warrant of December 1 was obtained does not, we submit, render the documents inadmissible in evidence. There is authority to the effect that, where an inspection of quasi-public documents reveals the commission of a crime, the documents may be seized without a warrant. *United States* v. *Rabicoff*, 55 F. Supp. 88 (W. D. Mo.); see also *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; *United States* v. *Sherry*, 294 Fed. 684, 686 (N. D. Ill.). Certainly it would seem that instrumentalities of the crime may be so seized (cf. *In re 14 East 17th Street*, 65 F. 2d 289, 291 (C. C. A. 2)), just as they may be seized without warrant pursuant to a lawful arrest. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30. In this view, no warrant was required for the seizure of the records in question, for, contrary to petitioner's contention (Br. 17–18), the $4,000 check and the books of account in which that check was reflected were clearly the means by which petitioner concealed and covered up his fraud upon the Navy Department.[5] But, even if

[5] The decision in *Takahashi* v. *United States*, 143 F. 2d 118 (C. C. A. 9), on which petitioner relies (Br. 17, 25), is not in point, for there documents seized during a lawful search of petitioner's person were suppressed on the ground that they were merely evidence and not instrumentalities of a crime. Furthermore, the documents were not quasi-public.

proper procedure requires that possession of the quasi-public documents be obtained by means of a valid warrant, the deficiency in the affidavit by which the warrant was secured was merely a procedural irregularity, and not the kind of misconduct which would bar the Government from using the evidence. Since the inspection was lawful, the persons making the inspection could testify to the facts they found, and, since the documents were quasi-public, their production at the trial could be required by subpoena under the authorities cited *supra*, p. 13. The technical deficiency in the procedure by which the documents were produced in court could not, therefore, have prejudiced petitioner, and does not, we submit, invalidate relevant evidence obtained without infringing petitioner's right of privacy under the Fourth Amendment or privilege against self-incrimination under the Fifth.[5]

2. There is no merit in petitioner's attack on the indictment on the ground that the allegations of Counts 4 and 5 are too indefinite to state offenses (Pet. 20, 24, Br. 32–45). Count 4 specified the amount of the claim, the date and place of its presentation, the officer to whom it was presented, and the nature of the falsity. Count

[5] Since the use of the evidence was proper, there is no occasion to consider whether, as petitioner claims (Pet. 19–20, Br. 25), the district court erred in denying his motion to investigate the grand jury minutes to determine whether the indictment was based on illegally secured evidence.

set forth in detail the nature of the trick, device, etc., employed by petitioner, *i. e.*, the endorsement of a blank check by McAvoy, the subsequent completion of the check in the sum of $4,000, and the cashing of the check by petitioner (R. 10–11). Both counts, therefore, met the test by which their validity must be judged; they informed petitioner of the nature of the offense, and barred future prosecution on the same charge. *Glasser* v. *United States,* 315 U. S. 60, 66; *Hagner* v. *United States,* 285 U. S. 427, 431; *Roberts* v. *United States,* 137 F. 2d 412, 414 (C. C. A. 4), certiorari denied, 320 U. S. 768; *Bersio* v. *United States,* 124 F. 2d 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. 2d 917, 921 (C. C. A. 2), certiorari denied, 309 U. S. 678. Contrary to petitioner's contention (Br. 35–40), it is not required that an indictment under Section 35 (A) of the Criminal Code (*supra,* p. 3) set forth a false claim in *haec verba. Summers* v. *United States,* 11 F. 2d 583, 584 (C. C. A. 4), certiorari denied, 271 U. S. 681; *Bridgeman* v. *United States,* 140 Fed. 577, 586 (C. C. A. 9).[1]

3. Petitioner's plea in abatement, based on the absence of women from the grand jury (R. 210–

[1] Petitioner's contention (Pet. 20, 26, Br. 46–48) that it was error to deny his motion for a bill of particulars (R. 110–120) raises no question for review. It is well established that the granting of such a motion is in the discretion of the trial court. *Wong Tai* v. *United States,* 273 U. S. 77, 82; *Dunlop* v. *United States,* 165 U. S. 486, 491.

212; see Pet. 20–21, 25, Br. 49–50), was properly overruled. There is no assertion that persons of petitioner's race or creed were excluded from the grand jury, and he has shown no prejudice resulting from the exclusion of women. *United States* v. *Pelley,* 132 F. 2d 170, 180 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Wuichet* v. *United States,* 8 F. 2d 561, 562 (C. C. A. 6); *United States* v. *Ballard,* 35 F. Supp. 105 (S. D. Cal.).

4. After the return of the indictment, petitioner filed a motion, addressed to certain Navy officers and to Government counsel, by which he sought the return of papers taken by the Navy after his arrest (R. 121, 205–207). Attached to the notice of motion was a copy of a letter written to a judge of the district court by Commander Smith of the Navy, in which the latter stated that Government property and petitioner's records had been moved to a fire-proof vault for protection, and that any part of the material would be released on order of the court (R. 124–125). Petitioner alleged generally that he needed the records for his defense, but did not specify the records which he sought (R. 122, 124, 126). On January 2, 1943, the motion was denied by the court on the grounds that it had no jurisdiction over the Navy Department (R. 32). On April 6, the opening day of the trial, petitioner filed an "objection to the jurisdiction of the court" on the ground that he had been denied due process of law because the records had not been returned to him (R. 212–213). In his affi-

davit annexed to the motion, petitioner admitted that he and his counsel had examined the records in the storage vault, but stated that the facilities were inconvenient (R. 214). After the trial opened, petitioner's counsel asked for a continuance on the ground that he had not had sufficient time to examine the records in the vault (R. 244). During the course of that argument, petitioner's counsel admitted that he had had full access to papers in the hands of Government counsel which had been taken under the search warrants (R. 254), but stated that he needed custody of the papers in the vault (R. 246, 254–255). After a conference of counsel, the documents requested by petitioner were produced in court, and the court granted petitioner's counsel the right to reserve cross-examination of witnesses until after the documents were examined (R. 260–261, 273).

Petitioner contends (Pet. 21, 25–26, Br. 50) that he was deprived of necessary material to prepare his defense, but he fails to specify the nature of the prejudice he claims. It is clear that he was given access to the documents before trial, and that he had ample time to examine them after they were produced in court. Moreover, from statements made by petitioner's counsel when granted the right to reserve cross-examination (R. 261), and from petitioner's motion in arrest of judgment (R. 221), it appears that the records in the vault related to wind-tunnel tests, a matter in-

volved in the first count in the indictment on which petitioner's conviction was reversed.

5. After the jury had been selected, one juror was observed to approach petitioner's co-defendant Scott and to engage in conversation with him. This was called to the attention of the trial judge, and, after a discussion among counsel at the bench, the juror was excused with the consent of all sides (R. 260–272). The discussion at the bench was in the presence, but out of the hearing, of petitioner (R. 261). No objection to the procedure was made at the time, but petitioner now urges (Pet. 20, Br. 51–54) that it was a deprivation of his right to be present at all stages of the trial. It is, however, established that the common practice of having conferences of counsel at the bench during the course of a trial does not violate a defendant's constitutional rights. *Steiner* v. *United States*, 134 F. 2d 931, 935 (C. C. A. 5), certiorari denied, 319 U. S. 774; cf. *Johnson* v. *United States*, 318 U. S. 189, 201.

6. Petitioner attacks the sufficiency of the evidence on various grounds:

a. The voucher, prepared by a Navy inspector for petitioner's signature (see fn. 2, p. 7, *supra*), listed the payment to McAvoy as "Other Direct Charges --- $4,300." (Gov. Ex. 19, see Br. 55). Petitioner urges (Pet. 21, Br. 55–56) there was therefore no evidence that, as charged in Count IV, he made a false claim for $4,000 "for

expenses incurred * * * in paying William H. McAvoy for services" (R. 8–9). Petitioner's books and the certificate supporting the voucher indicate clearly, however, that the claim was understood to be and was in fact a claim for reimbursement of money allegedly paid to McAvoy.

b. He also claims (Br. 56) a fatal variance in that the indictment charged a claim for $4,000, whereas the voucher represented a claim for $4,300. The evidence shows that petitioner paid McAvoy $300 in cash for which McAvoy gave petitioner a receipt, and the validity of that much of the claim is not questioned. In any event, the variance was clearly an immaterial one which did not prejudice petitioner's substantial rights. *Berger* v. *United States*, 295 U. S. 78, 82; Section 269 of the Judicial Code (28 U. S. C. 391).

c. As to Count 5, petitioner asserts (Pet. 21–22, Br. 56–58) that there was no evidence that, as charged in that count, he stated to Byars, the Navy cost inspector, that he had paid $4,000 to McAvoy, or that he presented the check for $4,000 to Byars. However, Byars testified that he examined petitioner's books reflecting the $4,000 payment, and received the certificates supporting the voucher in question by which petitioner certified that he had paid $4,000 to McAvoy (R. 515–517). Byars also identified Government's Exhibit 7, the $4,000 check, as representing the $4,000 item listed on petitioner's books (R. 515), thus

indicating that Byars had seen the check. Manifestly it was not necessary to prove that petitioner had made the representation orally or that he had personally shown the check to Byars.

d. Finally, petitioner contends (Pet. 22, Br. 59–61) that there was no proof of guilty knowledge on his part since his bookkeeper testified that his auditor Browne, rather than petitioner, had told her to fill in the check for $4,000. However, there was evidence that petitioner originally gave an estimate of $4,000 as the cost of the test pilot's fee and insurance when he had already agreed to pay McAvoy about $2,000; that he, himself, asked McAvoy to endorse the check in blank; that he gave the check to the bookkeeper to be filled in; that Browne testified that the check was not entered in September, when it was dated, because "we didn't have the amount of the check" (R. 430); that petitioner signed the voucher for $4,300, which was supported by a certificate signed by him that he had paid $4,000 to McAvoy (see Statement *supra*, pp. 5–8). This evidence warranted the jury in inferring that petitioner knew of and actively participated in the plan to defraud the Navy Department.[8]

[8] It is obvious that the directed verdict of acquittal as to Scott did not, as petitioner argues (Br. 62–63), require the exoneration of petitioner on the substantive charges. The crimes charged in Counts 4 and 5 (R. 8–11) can be committed by one person. Similarly, the direction to the jury to disregard Scott's name in the indictment (R. 669, 670; see Br.

7. Petitioner's various objections to the judge's charge are without merit.

a. Petitioner states (Pet. 22, 26, Br. 66–71) that the trial judge failed properly to instruct the jury concerning the applicable statute (*supra*, p. 3), that he did not read the statute and explain each significant term thereof. However, the judge read the indictment (R. 668–683) and instructed the jury very fully on the question of intent (R. 686–689), telling them that it was no offense to make a false claim against the United State unless the person making it understood that it was false and intended to defraud the Government (R. 687–688). The jury were thus fully instructed on the essential elements of the crimes charged. The failure of the judge to define a claim (see Br. 77) clearly did not prejudice petitioner since it is undisputed that a claim had been submitted to the Navy Department and had been paid.

b. After instructing the jury in many different ways that petitioner could be found guilty only if he willfully and deliberately presented a false claim; that he was not guilty if he acted in good faith even though he may have been mistaken (R. 686–687); that the person making the claim must know it to be false (R. 687–688); that he must have presented the claim "with a conscious

---

64–65) did not constitute an amendment of the indictment. Cf. *Salinger* v. *United States*, 272 U. S. 542, 549; *Ford* v. *United States*, 273 U. S. 593, 602; *Dealy* v. *United States*, 152 U. S. 539, 542.

knowledge that it was not true"; that "to do a thing wilfully is to do it by design, with set purpose"; that the jury must find that petitioner willfully presented a false claim (R. 688); that there must be guilty knowledge and bad purpose (R. 689), the judge added (*ibid.*):

> You are instructed that the word "wilful" is used in the statute in this case, and means a thing done without ground for believing it to be lawful, or conduct marked by careless disregard as to whether or not the thing done is lawful.

Assuming, as petitioner contends (Pet. 22, 25, 26, Br. 71–74), that this particular sentence in the charge was not a proper definition of willful, as used in Section 35 (A) of the Criminal Code (*supra*, p. 3, the error was immaterial in view of the explicit reiterated instructions on intent which immediately preceded it. Cf. *United States* v. *J. Greenbaum & Sons*, 123 F. 2d 770, 773 (C. C. A. 2); *Clarke* v. *United States*, 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; Section 269 of the Judicial Code, 28 U. S. C. 391.

c. After instructing the jury on the factors to be considered in determining the credibility of witnesses generally (R. 684–686), the trial judge told the jury that in estimating petitioner's credibility it was proper to consider all of the matters he had suggested to aid their determination of

the credibility of the other witnesses, "including the interests that the defendant may have in the case, his hopes and fears and what he has to gain or lose as a result of your verdict" (R. 686). Petitioner's suggestion (Pet. 22, 26, Br. 74–77) that this constituted hostile comment is frivolous.

8. After petitioner's appeal had been noted, he moved in the circuit court of appeals for a remand of the case to the district court, in order to enable him to move for a new trial on the ground that the certificate (in Exhibit 19) attached to the $4,300 voucher, by which he represented that he had paid $4,000 to test pilot McAvoy, was a forgery (R. 776–778). At the trial, petitioner on cross-examination, had admitted his signature on the certificate, but had stated that he "suspect[ed] that signature was put on that paper for the stress department and somebody has used that paper" (R. 645–646). In his motion, petitioner alleged that he saw the document for the first time when it was presented to him on cross-examination (R. 780). He also submitted an affidavit by an examiner of questioned documents to the effect that, in his opinion, the typewritten line for the signature had been added after the ink signature (R. 784–791). The circuit court of appeals denied petitioner's motion for a remand (R. 802), and petitioner attacks that ruling (Pet. 23, 26, Br. 81–83).

Exhibit 19, containing the certificate, was introduced in evidence on April 9, a week before petitioner testified with respect thereto (R. 362, 780). The evidence offered as new in the circuit court of appeals added nothing to petitioner's testimony at the trial that he suspected that the paper had been "used" (R. 781); the expert's opinion that the typing had been added after the signature did not of itself tend to show that the claim was made without petitioner's knowledge. Petitioner admitted signing the voucher for $4,300; he admitted asking McAvoy to endorse a blank check; he admitted paying McAvoy only $2,625 (R. 600–603, 607). His explanation was not that he had failed to make a claim for $4,300, but that he had obligated himself for insurance in an amount which would have brought the total of the test pilot's fee and insurance to more than $4,000 (R. 604–606, 639–643).[9] The evidence which he offered was, therefore, not newly discovered and not of a character which was likely to have affected the result. Hence, there was no abuse of discretion on the part of the circuit court of appeals in denying petitioner's motion for a remand.

CONCLUSION

The judgment below is correct, and the case presents no conflict of decisions or question of

[9] Petitioner's books of account showed a payment of $135.00 for insurance of the test pilot (R. 453).

general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
WALTER J. CUMMINGS, Jr.,
Attorneys.

NOVEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945